Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
	)	
Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in Cox's Service Territory in the Virginia Beach Metropolitan Statistical Area	)	WC Docket No. 08-49

REPLY TO OPPOSITION TO MOTION TO DISMISS OR, IN THE ALTERNATIVE, DENY PETITION FOR FORBEARANCE

One Communications Corp., Time Warner Telecom Inc.,[1] Integra Telecom, Inc., and Cbeyond Inc. (collectively, the "Joint Commenters"), through their undersigned counsel, hereby reply to Verizon's Opposition to Motion to Dismiss, or, in the Alternative, Deny Petition for Forbearance ("Opposition").[2] Verizon has provided no reason for the Commission to consider its petition for forbearance in Cox's service territory in the Virginia Beach Metropolitan Statistical Area ("MSA").[3] Therefore, the Commission should dismiss or summarily deny it forthwith.

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[1] Time Warner Telecom Inc. amended its Certificate of Incorporation effective March 12, 2008 to change its name to tw telecom inc. in preparation for a broader name change that will be effective July 1, 2008. The company will continue to use and be known as Time Warner Telecom Inc., its trade name, until July 1, 2008.

[2] *In re Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in Cox's Service Territory in the Virginia Beach Metropolitan Statistical Area*, Verizon's Opposition to Motion to Dismiss, or, in the Alternative, Deny Petition for Forbearance, WC Dkt. No. 08-49 (filed May 19, 2008).

[3] Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in Cox's Service Territory in the Virginia Beach Metropolitan Statistical Area, WC Dkt. No. 08-49 (filed Mar. 31, 2008) ("Petition").

I. DISCUSSION

In its Opposition,[4] Verizon fundamentally mischaracterizes the relevant FCC inquiry for determining whether to grant the Motion to Dismiss.[5] Verizon asserts that the Motion to Dismiss amounts to a request that the FCC "impose a waiting period" between UNE forbearance petitions, something Verizon asserts the FCC cannot and should not do. Opposition at 2. As the Joint Commenters explained in the Motion to Dismiss, the appropriate inquiry is whether the FCC is required to *consider the merits* of a forbearance petition that seeks the same relief in the same markets as a recently denied petition in the absence of evidence that there has been a material change in circumstances. As discussed herein, the Commission must dismiss or summarily deny Verizon's petition because (1) it offers no new facts demonstrating a material change in the state of competition in the Virginia Beach MSA—which obviously encompasses Cox's service territory in the Virginia Beach MSA—since the FCC issued the *6-MSA Order*;[6] and (2) it raises issues that were already raised and rejected, or should have been raised, in the 6-MSA proceeding.

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[4] *See generally* Opposition.

[5] *In re Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in Cox's Service Territory in the Virginia Beach Metropolitan Statistical Area*, Motion to Dismiss or, in the Alternative, Deny Petition for Forbearance, WC Dkt. No. 08-49 (filed Apr. 29, 2008) ("Motion to Dismiss").

[6] *Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas*, Memorandum Opinion and Order, 22 FCC Rcd. 21293 (rel. Dec. 4, 2007) ("*6-MSA Order*").

A. Verizon's Petition Addresses The Same Market Conditions As Those That Were At Issue In The Virginia Beach-MSA Petition.

Verizon argues that: (1) the FCC "established a bright-line test" in the *6-MSA Order* under which it determines whether "competitors[] have achieved a certain share of residential lines"; (2) this bright-line test "may not be met one day but [may be] met the next"; and (3) the Commission is "required [] to permit parties that initially fail that test to reapply as the facts change." Opposition at 6. This argument is flawed in several respects. To begin with, there is no such "bright-line test." Market share was only one, among many, indicia of competition in the Commission's forbearance analysis. As the FCC expressly held, in analyzing the competitiveness of the marketplace, "the Commission does not limit itself to market share alone, but also looks to other factors including supply substitutability, elasticity of demand, and firm cost, size, and resources." *6-MSA Order* ¶ 28. Accordingly, the Commission examined these factors (*id.* ¶ 31) as well as "evidence of the competitive gains of facilities-based competitors" (*id.* ¶ 30), "the comparatively limited role of the cable operators in serving enterprise customers" (*id.* ¶ 37) and the absence of "significant alternative sources of wholesale inputs for carriers" (*id.* ¶ 38) in its decision to deny the requested forbearance relief in the 6 MSAs at issue. Thus, there is no dispositive market share threshold for Verizon to meet today that it could not satisfy in December. Otherwise, by Verizon's logic, it could reasonably file—and the Commission would be required to carefully consider—a new forbearance petition everyday.

More importantly, the material facts have *not* changed. As Joint Commenters explained in the Motion to Dismiss, the facts presented by Verizon in its petition for forbearance in Cox's service territory in the Virginia Beach MSA are merely a subset of the same facts proffered by Verizon in its petition for forbearance in the entire Virginia Beach MSA. *See* Motion to Dismiss at 1, 5-7. Indeed, Verizon already provided Virginia Beach-MSA-specific competitive data—

including alleged cut-the-cord wireless, wireline CLEC, and cable telephony data—to the FCC only two days before the Commission released the *6-MSA Order*. *See* Motion to Dismiss n.25. Still, Verizon claims that the data in its latest Virginia Beach forbearance petition are "at least three months" more current than the latest data in the record in the 6-MSA proceeding. Opposition at 4. This, however, is a distinction without a difference. As the Commission has repeatedly found, the development of facilities-based competition, and in particular, competitors' deployment of loop facilities, is a slow and uncertain process.[7] Accordingly, absent extraordinary circumstances, one would not expect there to be significant changes in the competitive landscape in just a few months. Moreover, Verizon has failed to demonstrate that such circumstances exist. It has not offered any evidence that there has been any material change in the competitive landscape in Cox's service territory in the Virginia Beach MSA during the period of less than four months between the Commission's rejection of the Virginia Beach MSA forbearance petition and Verizon's filing of the instant petition. For this reason, the FCC must dismiss or summarily deny Verizon's petition for forbearance in Cox's service territory in the Virginia Beach MSA.

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[7] *See, e.g., Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability,* Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 16978, ¶¶ 303, 326 (2003) ("*TRO*"); *see also Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd. 2533, ¶ 39 (2005) ("*TRRO*") ("To the extent that [cable companies] compete in other product markets, like the enterprise services market, such competition is evolving more slowly and in more limited geographic areas.").

B. Verizon's Petition Should Be Dismissed Based On The Principles Underlying The FCC's Restrictive Standard For Petitions For Reconsideration.

Dismissal under these circumstances would be entirely consistent with the FCC's treatment of petitions for reconsideration. It is well established that reconsideration of a Commission decision "is warranted only if the petitioner cites material error of fact or law or presents new or previously unknown facts and circumstances which raise substantial or material questions of fact that were not considered and that otherwise warrant Commission review of its prior action."[8] Verizon has failed to present new or previously unknown facts in the instant petition and therefore cannot meet this standard. Moreover, even if the instant petition is not a petition for reconsideration *per se*, it essentially asks the Commission to reconsider whether there is sufficient competition in the portion of the Virginia Beach MSA served by Cox to justify forbearance, and is effectively a late-filed petition for reconsideration.[9] For example, Verizon's petition for forbearance in Cox's service territory in the Virginia Beach MSA responds directly to the Commission's "concern[]" in the *6-MSA Order* that decreases in residential access lines should "account for the loss of second lines to DSL" (Opposition at 5) with arguments based on data to which it had access during the 6-MSA proceeding. Thus, there is no reason for the FCC to depart from its established practice of denying such petitions where they are not based on any

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[8] *In re Definition of Markets for Purposes of the Cable Television Broadcast Signal Carriage Rules*, Order on Reconsideration, 16 FCC Rcd. 5022, ¶ 18 (2001).

[9] *See In re Petition of: Budd Broadcasting Co., Inc.*, Memorandum Opinion and Order, 14 FCC Rcd. 4366, ¶ 3 (Cable Services Bur. 1999) (finding that the broadcast licensee's market modification petition was "essentially a late filed reconsideration petition" where it sought addition of certain Florida communities to the television market of the licensee's station, a request that the licensee had made, and that the Bureau had denied, in a prior proceeding).

new or previously unknown facts.[10] Furthermore, as explained in the Motion to Dismiss, to the extent that Verizon's petition cites material error of law in the *6-MSA Order*, Verizon is already seeking review of the *Order* in the D.C. Circuit and it is well established that a party cannot seek simultaneous agency reconsideration and judicial review of an agency order. *See* Motion to Dismiss n.37.

C. Verizon's Petition Should Be Dismissed Under Established Principles Of Issue And Claim Preclusion.

The FCC should dismiss or summarily deny Verizon's petition for forbearance in Cox's service territory in the Virginia Beach MSA on preclusion grounds. Issue preclusion "bars relitigation of an issue by a party 'that has *actually litigated [the] issue.*'"[11] As the Commission has recognized, the principle underlying the doctrine of issue preclusion is that "'one who has actually litigated an issue should not be allowed to relitigate it.'"[12] Relatedly, claim preclusion prevents "'litigation of matters that *should have been* raised in an earlier suit.'"[13] As the Commission has also recognized, the principle underlying claim preclusion is "'that a party who

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[10] *See, e.g., id.* ¶¶ 5-7 ("[W]e deem this minimal amount of new 'local' programming insufficient to justify revisiting a television station's market modification request."); *see also Gordon County Broadcasting Co. v. FCC*, 446 F.2d 1335, 1338 (D.C. Cir. 1971) (affirming FCC's refusal to allow the broadcast licensee to introduce evidence to relitigate a collateral issue because "[n]o new element has been added to this case by the proffered evidence").

[11] *SBC Communications Inc. v. FCC*, 407 F.3d 1223, 1229 (D.C. Cir. 2005) (quoting Restatement (Second) of Judgments at 6 (1982) (emphasis in original)).

[12] *In re Application of Barry Skidelsky, Bradmark Broadcasting Company et al.*, Memorandum Opinion and Order, 7 FCC Rcd. 1392, ¶ 8 (Review Board 1992) (quoting *In re RKO General, Inc.*, 94 F.C.C.2d 890, 895 (1983)).

[13] *SBC Communications Inc.*, 407 F.3d at 1230 (quoting *Marrese v. American Academy of Orthopedic Surgeons*, 470 U.S. 373, 376 n.1 (1985) (emphasis in original)).

once has had *a chance to* litigate a claim before an appropriate tribunal usually ought not to have another chance to do so.'"[14]

These principles apply here. Verizon is precluded from raising the issue of whether there is sufficient competition in the relevant product markets in Cox's service territory in the Virginia Beach MSA because the Commission considered and actually decided this issue in the *6-MSA Order*. Indeed, as mentioned above, Verizon already provided competitive data specific to the Virginia Beach MSA in the 6-MSA proceeding. Verizon also makes several legal arguments in the instant petition based on facts that were readily available to it in the prior proceeding. These include the arguments that only the portion of the Virginia Beach MSA served by Cox is the relevant geographic market for forbearance purposes; that directory listings are a reliable proxy for competitors' market share; and that competitive data should be analyzed on a rate-center basis instead of a wire-center basis. *See* Opposition at 4-5. Verizon could have—*and should have*—raised these arguments in the 6-MSA proceeding.[15] As the FCC has stated, under claim preclusion, "a plaintiff usually must assert in one action *all* claims against a defendant that arise

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[14] *Id.* at 1229 (quoting Restatement (Second) of Judgments at 6 (1982) (emphasis in original)); *In re Applications of Chapman S. Root Revocable Trust*, Memorandum Opinion and Order, 8 FCC Rcd. 4223, ¶ 9 (1993) ("It is well established . . . that the Commission will not grant rehearing 'merely for the purpose of again debating matters on which the tribunal has once deliberated and spoken.'") (internal citation omitted).

[15] For example, Verizon candidly acknowledges that in the 6-MSA proceeding, Cox had stated on the record that it does not provide service or track customer locations on a wire-center basis. *See* Petition at 8-9 (quoting Letter from J.G. Harrington, Counsel for Cox Communications, Inc. to Marlene H. Dortch, Secretary, FCC, Attachment at 1, WC Dkt. No. 06-172 (filed Nov. 21, 2007)). Accordingly, Verizon should have made the argument that competitive data should be analyzed on a rate-center basis instead of a wire-center basis in the prior proceeding.

from the same operative facts."[16] Verizon should not get a second bite at the proverbial apple here.

The interests underlying the preclusion doctrines—fairness, administrative finality, and judicial economy—also require dismissal of Verizon's petition.[17] First, by refiling its forbearance petition for portions of the Virginia Beach MSA, Verizon is unfairly compelling competitive carriers to participate in this repetitive and meritless forbearance proceeding. Second, finality of the prior proceeding is necessary for regulatory stability and maintenance of the settled expectations of the parties. Third and most importantly, sound administrative process requires avoidance of wasteful, duplicative proceedings such as this one. Verizon may scoff at the need to make efficient use of agency resources (*see* Opposition at 6), but reconsideration of a meritless forbearance request is uneconomical and diverts the Commission's attention from important matters needing resolution. The FCC must dismiss or summarily deny Verizon's petition for forbearance in Cox's service territory in the Virginia Beach MSA to discourage parties from filing repetitive forbearance requests that contain no new material evidence of competition. To be sure, Section 10 does not by its terms expressly prohibit parties from filing as many forbearance petitions as they would like. But the Commission also has the right *and*

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[16] *In re COMSAT Corp. v. IDB Mobile Communications, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd. 7906, ¶ 13 (2000) (emphasis in original).

[17] *See, e.g., id.* ¶¶ 18-20; *see also In re COMSAT Corp. v. Stratos Mobile Networks, LLC*, 15 FCC Rcd. 22338, ¶ 13 (Enforcement Bur. 2000) (claim preclusion rests "'largely on the ground that fairness to the defendant, and sound judicial administration, require that at some point litigation over the particular controversy come to an end'") (quoting Restatement (Second) of Judgments § 19, comment a); *In re Applications of WIOO, Inc.*, Decision, 95 F.C.C.2d. 974, ¶ 22 (1983).

duty to state that it has already considered the issue of whether to grant forbearance in a given market(s), and, where it has, to dismiss the petition on such grounds.

II. CONCLUSION

For the foregoing reasons, the Commission should dismiss or summarily deny Verizon's petition for forbearance in Cox's service territory in the Virginia Beach MSA.

Respectfully submitted,

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May 27, 2008

CERTIFICATE OF SERVICE

I, Nirali Patel, hereby certify that true and correct copies of the foregoing Reply to Opposition to Motion to Dismiss, or, in the Alternative, Deny Petition for Forbearance in WC Docket No. 08-49 were delivered via U.S. mail and e-mail, this 27th day of May 2008, to the following:

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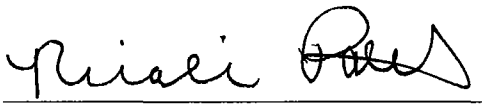

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